

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF ALABAMA  
SOUTHERN DIVISION

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TIMMY TERRELL HARRIS

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Plaintiff,

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v.

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1:06-CV-329-WHA  
(WO)

KIRK ADAMS, *et al.*,

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Defendants.

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**RECOMMENDATION OF THE MAGISTRATE JUDGE**

Timmy Harris, an inmate incarcerated at the Dale County Jail located in Ozark, Alabama, filed this 42 U.S.C. § 1983 on April 11, 2006. He alleges that Defendants, District Attorney Kirk Adams and Dale County Sheriff Investigator Wally Olson, violated his constitutional rights during criminal court proceedings held before the Circuit Court for Dale County, Alabama. Plaintiff seeks service of the complaint on Defendants and monetary damages.

Upon review of the complaint, the court concludes that dismissal of this case prior to service of process is appropriate under 28 U.S.C. § 1915(e)(2)(B).<sup>1</sup>

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<sup>1</sup>A prisoner who is allowed to proceed *in forma pauperis* in this court will have his complaint screened in accordance with the provisions of 28 U.S.C. § 1915(e)(2)(B). This screening procedure requires the court to dismiss a prisoner's civil action prior to service of process if it determines that the complaint is frivolous, malicious, fails to state a claim upon which relief may be granted, or seeks monetary damages from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2)(B)(i)-(iii).

## **I. THE COMPLAINT**

Plaintiff alleges that District Attorney Kirk Adams subjected him to vindictive prosecution by initiating a charge of third degree burglary against him and processing the case arising from such charge through the use of evidence obtained pursuant to an illegal search and seizure. Plaintiff further asserts that Defendant Adams is using the burglary case as leverage against him in hopes that he might plead guilty to a felony. Lastly, Plaintiff maintains that Defendant Adams is operating under a conflict of interest based on his father's legal representation of individuals who "were named in a lawsuit filed as the cross claim of the charge of burglary 3<sup>rd</sup>." (Doc. No. 1.)

Plaintiff also names Dale County Sheriff Investigator Wally Olson as a defendant. He contends that Defendant Olson denied him a fair trial by lying under oath and tampering with and/or fabricating evidence. (Doc. No. 1.)

## **II. DISCUSSION**

### ***A. The District Attorney***

Plaintiff challenges Defendant Adams' conduct in initiating and prosecuting a charge of third degree burglary against him. "A prosecutor is entitled to absolute immunity for all actions he takes while performing his function as an advocate for the government." *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993). The prosecutorial function includes the initiation and pursuit of criminal prosecution, *Imbler v. Pachtman*, 424 U.S. 409, 424 (1976), and all appearances before the court, including examining witnesses and presenting evidence. *See*

*Burns v. Reed*, 500 U.S. 478, 492 (1991).” *Rowe v. Fort Lauderdale*, 279 F.3d 1271, 1279 (11<sup>th</sup> Cir. 2002); *see also Mastroianni v. Bowers*, 60 F.3d 671, 676 (11<sup>th</sup> Cir. 1998).

[A]bsolute immunity is an entitlement to be free from suit for money damages.... [T]he purpose of the immunity is to shield officials from the distractions of litigation arising from the performance of their official functions. To fulfill its purpose, official immunity protects government officials not only from having to stand trial, but also from having to bear the other burdens attendant to litigation, including pretrial discovery.... In *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976), the Supreme Court held that a prosecutor is absolutely immune from civil suit for damages under section 1983 for actions taken "in initiating a prosecution and in presenting the State's case." *Id.* at 431, 96 S.Ct. at 995.

*Marx v. Gumbinner*, 855 F.2d. 783, 788-89 (11<sup>th</sup> Cir. 1988).

The actions about which Plaintiff complains with respect to Defendant Adams arise from this defendant’s role “as an ‘advocate’ for the state” and such actions are “intimately associated with the judicial phase of the criminal process.” *Mastroianni*, 60 F.3d at 676. (citations omitted). Defendant Adams is, therefore, “entitled to absolute immunity for that conduct.” *Id.*

### ***B. The Dale County Sheriff’s Investigator***

Plaintiff complains that Defendant Olson denied him a fair trial by lying under oath and tampering with or fabricating evidence. Plaintiff’s perjury claim provides no basis for relief.

The law is well settled that 42 U.S.C. § 1983 does not authorize the assertion of a

claim against a police officer or other individual for committing perjury during state court proceedings. *Briscoe v. LaHue*, 460 U.S. 325 (1983). "[I]n litigation brought under 42 U.S.C. § 1983 . . . , all witnesses - police officers as well as lay witnesses - are absolutely immune from civil liability based on their testimony in judicial proceedings. [*Briscoe v. LaHue*,] 663 F.2d 713 ([7th Cir.] 1981)." *Id.* at 328. The Court further implied that the false testimony of a police officer in and of itself does not violate an accused's constitutional rights. *Id.* at 327, n. 1. Thus, Plaintiff's perjury claim is without legal basis and, as such, is subject to dismissal under 28 U.S.C. § 1915(e)(2)(B)(i). *Neitzke v. Williams*, 490 U.S. 319, 327 (1989).

Plaintiff alleges that Defendant Olson tampered with or fabricated evidence in order to obtain a conviction against him on the charge of third degree burglary. This claim may not proceed in a § 1983 action. This claim goes to the fundamental legality of Plaintiff's confinement, and, consequently, provides no basis for relief at this time. *Edwards v. Balisok*, 520 U.S. 641, 646 (1997); *Heck v. Humphrey*, 512 U.S. 477 (1994); *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973).

In *Heck*, the Supreme Court held that a claim for damages challenging the legality of a prisoner's conviction or confinement is not cognizable in a 42 U.S.C. § 1983 action "unless and until the [order requiring such confinement] is reversed, expunged, invalidated, or impugned by the grant of a writ of habeas corpus" and complaints containing such claims must therefore be dismissed. 512 U.S. at 483-489. The Court emphasized that "habeas corpus is the exclusive remedy for a [confined individual] who challenges the fact or duration

of his confinement and seeks immediate or speedier release, even though such a claim may come within the literal terms of § 1983” and, based on the foregoing, concluded that Heck’s complaint was due to be dismissed as no cause of action existed under section 1983. *Id.* at 481. In so doing, the Court rejected the lower court's reasoning that a section 1983 action should be construed as a habeas corpus action.

In *Balisok*, the Court further concluded that an inmate's “claim[s] for declaratory [and injunctive] relief and money damages, . . . that necessarily imply the invalidity of the punishment imposed, is not cognizable under § 1983 . . .” unless the inmate can demonstrate that the challenged action has previously been invalidated. 520 U.S. at 648. Moreover, the Court determined that this is true not only when a prisoner challenges the judgment as a substantive matter but also when “the nature of the challenge to the procedures could be such as necessarily to imply the invalidity of the judgment.” *Id.* at 645. The Court reiterated the position taken in *Heck* that the “sole remedy in federal court” for a prisoner challenging the constitutionality of his confinement is a petition for writ of habeas corpus. *Id.* Additionally, the Court “reemphasize[d] . . . that a claim either is cognizable under § 1983 and should immediately go forward, or is not cognizable and should be dismissed.” *Id.* at 649.

Plaintiff’s claim that Defendant Olson fabricated and/or tampered with evidence represents a challenge to the constitutionality of his third degree burglary conviction. A judgment in favor of Plaintiff in this cause of action would necessarily imply the invalidity of this conviction. It is clear from the complaint that the conviction about which Plaintiff complains has not been invalidated in an appropriate proceeding. Consequently, the instant

collateral attack on the third degree robbery conviction is prohibited as habeas corpus is the exclusive remedy for a state prisoner who challenges the validity of the fact or duration of his confinement. *Balisok*, 520 U.S. at 645; *Heck*, 512 U.S. at 481; *Preiser*, 411 U.S. at 488-490. Such attack is, therefore, subject to summary dismissal by this court in accordance with the provisions of 28 U.S.C. § 1915(e)(2)(B)(ii).

### III. CONCLUSION

Accordingly, it is the RECOMMENDATION of the Magistrate Judge that:

1. Plaintiff's claims against Defendants Adams be DISMISSED with prejudice pursuant to 28 U.S.C. § 1915(e)(2)(B)(i);
2. Plaintiff's perjury claim against Defendant Olson be DISMISSED with prejudice pursuant to 28 U.S.C. § 1915(e)(2)(B)(i);
3. Plaintiff's challenge to the validity of his third degree burglary conviction be DISMISSED without prejudice pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii);
4. This complaint be DISMISSED prior to service of process.

It is further

ORDERED that the parties are DIRECTED to file any objections to the said Recommendation on or before **May 1, 2006**. Any objections filed must specifically identify the findings in the Magistrate Judge's Recommendation objected to. Frivolous, conclusive or general objections will not be considered by the District Court. The parties are advised that this Recommendation is not a final order of the court and, therefore, it is not appealable.

Failure to file written objections to the proposed findings and recommendations in the Magistrate Judge's report shall bar the party from a *de novo* determination by the District Court of issues covered in the report and shall bar the party from attacking on appeal factual findings in the report accepted or adopted by the District Court except upon grounds of plain error or manifest injustice. *Nettles v. Wainwright*, 677 F.2d 404 (5<sup>th</sup> Cir. 1982). *See Stein v. Reynolds Securities, Inc.*, 667 F.2d 33 (11<sup>th</sup> Cir. 1982). *See also Bonner v. City of Prichard*, 661 F.2d 1206 (11<sup>th</sup> Cir. 1981, *en banc*), adopting as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

Done this 18<sup>th</sup> day of April 2006.

/s/ Vanzetta Penn McPherson  
VANZETTA PENN MCPHERSON  
UNITED STATES MAGISTRATE JUDGE